STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2011
v	No. 294279 Oakland Circuit Court
ROBERT DANIEL CLARAMUNT, Defendant-Appellant.	LC No. 2008-221122-FH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that defendant Robert Daniel Claramunt's challenge to his sentence qualifies as moot, and would instead decide two of the issues presented in Claramunt's favor.

Claramunt pleaded no contest to resisting or obstructing a police officer, MCL 750.81d(1), domestic violence, MCL 750.81(2), disturbing the peace, MCL 750.170, and malicious destruction of personal property, MCL 750.377a(1)(d). In November 2008, the trial court sentenced Claramunt as a third habitual offender, MCL 769.11, to 27 months' to 15 years' imprisonment for the resisting or obstructing conviction, together with concurrent sentences of 93 days for the domestic violence and malicious destruction of property convictions, and 90 days for the disturbing the peace conviction. Claramunt appeals by delayed leave granted his sentence for the resisting or obstructing conviction.

The majority concludes that because Claramunt has served his minimum sentence, this Court lacks the ability to fashion a remedy, making his appellate claims moot. *Ante* at 1-2. In my view, a remedy exists: correction of the sentencing information report (SIR). Notwithstanding that Claramunt has served his 27-month minimum sentence, correction of the SIR may influence Claramunt's eligibility for parole. Stated differently, this Court's failure to correct Claramunt's sentence may negatively affect his ability to achieve parole, rendering his sentencing claims justiciable. "[A]n issue is not moot if the action complained of will continue to adversely affect the party in some collateral way." *Lenart v Ragsdale*, 148 Mich App 571, 575; 385 NW2d 282 (1986). In *People v Melton*, 271 Mich App 590, 593 (opinion by DAVIS, P.J.); 722 NW2d 698 (2006), a conflict panel of this Court observed that "a scoring error may still affect a defendant through such things as its effect on the calculation of parole eligibility." "The parole board may consider" "[t]he nature and seriousness of the offenses for which the

prisoner is currently serving." 1996 MR 1, R 791.7715(2)(a)(i). Consequently, a judicial finding used to enhance a defendant's sentence likely merits parole board attention. Because the information contained in Claramunt's SIR could collaterally influence his parole eligibility, I respectfully disagree with the majority's decision to decline review of the factors providing the foundation for his minimum sentence.

The presentence investigation report (PSIR) describes as follows the events surrounding Claramunt's plea-based convictions:

> On 04/28/08, Oakland County Sheriff Deputy was on patrol in the parking lot of Kroger's when the store managers waived [sic] him down. The managers told the deputy that a female employee had just been assaulted by her ex-boyfriend, the defendant, when he threw a knife at her and then fled the store. The deputy was told that the defendant entered the K-Mart. The deputy along with the two Kroger managers entered K-Mart to look for the defendant. One of the managers pointed the defendant out to the deputy. The deputy activated his taser when the defendant ran into the aisle with the deputy. The deputy walked towards the defendant and ordered him to stop. The defendant began to turn so the deputy ordered him to stop or be tasered. The defendant yelled for the deputy to go ahead and began sprinting away from the deputy. The deputy deployed the taser and both darts impacted the defendant, but had no affect [sic] on the defendant. The defendant continued running and snapped both leads. The deputy reloaded the taser and continued to pursue the defendant on foot through the store. The defendant exited the store and the deputy followed on foot. The deputy requested backup and got his vehicle and began to pursue the defendant. He observed the defendant walking behind a gas station, now coatless and shirtless. The deputy again pursued him on foot when the defendant came from behind a dumpster riding a bike. The deputy followed in his patrol car and pulled up in front of the defendant when the defendant ran into the front tire of the patrol car. The defendant fell to the ground, but was uninjured. The defendant was ordered to turn to his stomach. He began to turn over, but then was going to get up when another deputy arrived. The defendant now complied and was secured. The defendant was placed inside the patrol car. The defendant's coat and shirt were recovered with one of the taser darts still attached to the coat.

Claramunt complains that the trial court erred by scoring any points under offense variable (OV) 1 or OV 2, which concern, respectively, the "aggravated use of a weapon," MCL 777.31(1), and the "lethal potential" of a weapon possessed or used. MCL 777.32(1).[1]

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[1] The trial court scored five points for OV 1, which permits a court to assess five points when "[a] weapon was displayed or implied." MCL 777.31(1)(c). The trial court also scored five points under OV 2, which allows this score when "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

Claramunt contends that because he did not possess a weapon when he committed the sentencing offense, resisting or obstructing a police officer, these OVs should not have been scored.

In *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009), our Supreme Court held that "the offense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise." Alternatively phrased, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. at 122. No evidence of record supported the trial court's finding that Claramunt used a weapon when he resisted the police officers who tried to subdue him. Rather, the information available to the trial court established that Claramunt had divested himself of the knife before resisting arrest. Subtracting 10 points from Claramunt's OV scores would have placed him in a different sentencing grid, resulting in a lower minimum sentence. MCL 777.68. Because the parole board may consider all information pertinent to Claramunt's sentence, I would remand for correction of the SIR.[2]

/s/ Elizabeth L. Gleicher

[2] In my view, Claramunt's unpreserved challenge to the scoring of OV 19 lacks merit. Given Claramunt's aggressive behavior, the trial court could properly have found that his actions amounted to a use of force in an attempt to interfere with the administration of justice. *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004).